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Motion for leave to File Bill

Filed May 20, 1901.

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In the Supreme Court

of the United States.

3 Orig'l.

C. T. 1906

THE STATE OF KANSAS,
Complainant,
vs.
THE STATE OF COLORADO,
Defendant.

No......

Motion for Leave to File Bill in Equity.

A. A. GODARD,
Attorney General, and Solicitor for Complainant.

E. F. WARE,
Of Counsel.

In the Supreme Court
of the United States.

THE STATE OF KANSAS, *Complainant,*
vs.
THE STATE OF COLORADO, *Defendant.* } *No.* ——

MOTION FOR LEAVE TO FILE BILL IN EQUITY.

THE state of Kansas, by its attorney general, appearing in that behalf by and with the authority, consent and direction of the governor of said state, comes now here and presents this its motion for leave to file in this court a bill in equity against the state of Colorado, and to have process issued thereon. A true copy of said bill is herewith exhibited to the court, and twenty-five copies thereof are now on file with the clerk of this court. And as the grounds of this motion, the said state of Kansas, complainant, shows to this honorable court:

1. That the state of Kansas is one of the United States of America, admitted into the union January 29, 1861.

2. That the state of Colorado is one of the United

States of America, admitted into the union August 1, 1876.

3. That the Arkansas river rises in the Rocky mountains, in the state of Colorado, and flows in said state a distance of about two hundred and eighty miles, and thence into the state of Kansas, and that all tributaries entering it, in the state of Colorado, have their rise and entire flow in said state.

4. That during the winter season deep snows accumulate in said mountains in the state of Colorado, and within the drainage area of said river, which melting during the spring and summer, the waters therefrom flow directly and in great volume in said river, from early spring until the month of August in each year.

5. That the length of the course of said river in the state of Kansas is about three hundred and ten miles; and the volume of water in the bed of said river flowing from the state of Colorado into and through the state of Kansas formerly was, and should and would now be, very large but for the wrongful diversion of the same in and by the state of Colorado, as alleged in the bill.

6. That throughout its entire course in the state of Kansas said river flows through a broad valley of porous, alluvial deposits, commonly called "bottom lands," all of which, whether abutting upon said river or situated elsewhere in said valley, are, extending throughout the entire length and breadth thereof in the state of Kansas, underlaid with sand and gravel, through which the waters of said river

have flowed time out of mind. All of said lands are exceedingly fertile and valuable when supplied with moisture.

7. That by reason of the meager and uncertain rainfall in said valley in the state of Kansas, the said underflow, which is almost entirely furnished and supplied by the water which flows and should flow in said river from the state of Colorado into the state of Kansas, is necessary for the growing and maturing of all cultivated crops, as well as of grasses and vegetation, in said valley within the state of Kansas.

8. That all the lands in said river valley in the state of Kansas were formerly and originally a part of the public domain of the United States, and title to all of said lands was acquired from the United States by settlers, grantees, and purchasers, in whom and in whose successors in interest the said title, together with all riparian and other rights appertaining to said lands, have remained at all times and are still vested. That the rights of the state of Kansas and of citizens of said state were acquired prior to the date of any claims to said waters made by or in state of Colorado.

9. That at the time the title to said lands passed from the United States to said settlers, grantees, and purchasers, all the riparian and other rights of the common law attached to said lands as incident to said title.

10. That the state of Kansas is now and has been for many years the owner and in actual possession and

occupancy of two large tracts of land situate in said valley, one of which is located near the city of Dodge City, Kan., and abuts upon said river, and upon which the state of Kansas many years ago constructed and has ever since maintained a state institution known as "The Soldiers' Home"; and that the other of said two tracts of land is situated near the city of Hutchinson, Kan., upon which tract the state of Kansas constructed many years ago, and has at all times since maintained, a state institution used as an "Industrial Reformatory."

11. That each of said tracts of land so owned and occupied by the state of Kansas is used and cultivated by said state for the purpose of raising and producing thereon grain and vegetables, and of raising and maintaining thereon stock, for the use and support of said state institutions; and in order that said lands may be productive or useful for the purposes aforesaid, or for any other purpose, it is necessary that the said underflow of the Arkansas river beneath the surface of said lands be not impaired or diminished in any way.

12. That the state of Colorado has heretofore granted license and authority to persons, companies and corporations to construct ditches and canals for irrigation and other purposes, by means and as the result of which large portions of the water of the Arkansas river have been, and are still, diverted therefrom within the state of Colorado; that said waters so diverted have been, and are still, appropriated and consumed by said persons, companies and

corporations so licensed and authorized, and are in no event returned or permitted to flow back into the channel of said river, but are used for the irrigation of arid non-riparian lands; and that by reason of said diversion of said waters the state of Kansas and thousands of its citizens, as owners of lands in said valley within the state of Kansas, are deprived of their rights to the flow and use of said water in the bed of said river and the said underflow of said river, and are for that reason greatly and irreparably damaged.

13. That the state of Colorado, in its own behalf, has constructed and is now constructing large ditches, canals and reservoirs for the purpose of diverting and storing thereby and therein, within the state of Colorado, practically all of the water flowing or that would otherwise flow in the channel of said Arkansas river, and for the purpose of using and appropriating said water for irrigation and other uses upon lands not riparian nor adjacent to said river, and with the effect that none of said water so diverted, stored and used is or will be returned to the channel of said river, or to the use and benefit of the state of Kansas or its citizens owning and occupying lands in the valley of said river in said state, as aforesaid.

14. That the state of Colorado threatens to divert and appropriate as aforesaid all of the waters of said Arkansas river within the state of Colorado, and will so divert and appropriate the same unless restrained therefrom, to the great and irreparable loss and damage and in utter disregard of the rights of the state of Kansas and of its citizens.

15. That if the state of Colorado is permitted to divert and appropriate the waters of said river as aforesaid, the lands of the state of Kansas hereinbefore mentioned, as well as the lands of the thousands of citizens of said state, situate in said valley within the state of Kansas, will be thereby greatly impaired in value and usefulness, and will be rendered practically unfit for the production of crops, and for the growth of grasses, fruits, and other vegetation, or for any other purposes to which said lands have been heretofore and should now and hereafter be devoted.

16. That the common law relative to riparian rights is now and has been in full force in the states of Kansas and Colorado since long before their admission into the union; and the diversion and appropriation of the waters of the Arkansas river by and in the state of Colorado, as aforesaid, has been, and is and will be wrongful, and in utter disregard and violation of the rights and interests of the state of Kansas and of its citizens.

17. That as a necessary result of the diversion and appropriation of the water of said river by and in the state of Colorado, as aforesaid, thereby causing the water of said river to cease flowing in its natural channel, normal volume and under the surface of said lands within the state of Kansas, the owners and occupants of lands in said valley are and will be wholly deprived of water necessary for domestic use and for watering animals; and the atmosphere in the vicinity of said river will be deprived of the moisture necessary to the health and well-being of the inhabitants.

18. That, unless complainant be permitted to file its bill herewith submitted and to obtain in this court, and by suit in equity therein, a decree enjoining the state of Colorado from doing the things complained of, complainant is remediless, and defendant can and will destroy the value of complainant's property to the extent of many thousands of dollars, and the property of citizens of Kansas to the extent of many millions of dollars, and the revenues of said state will be greatly impaired, all in violation of complainant's rights and the rights of said citizens, and in the absence of any right or authority for so doing.

Attorney General,
and Solicitor for Complainant.

Of Counsel.

No. 3 Orig.

Bill in Equity

Office Supreme Court U.S.
FILED
MAY 20 1901
JAMES H. McKENNEY,
Clerk.

Filed May 20, 1901.

In the Supreme Court
of the United States.

THE STATE OF KANSAS,
Complainant,
vs.
THE STATE OF COLORADO,
Defendant.

No. 3 Orig.
O. T. 190

BILL IN EQUITY.

A. A. GODARD,
Attorney-general of the State of Kansas.

E. F. WARE,
Of Counsel.

In the Supreme Court
of the United States.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your orator, The State of Kansas, brings this its Bill of Complaint against the State of Colorado, and avers:

1. The state of Kansas is one of the United States of America, admitted into the union January 29, 1861. The state of Colorado is one of the United States of America, admitted into the union August 1, 1876.

2. This bill is exhibited and these proceedings are had by direction of Honorable W. E. Stanley, the duly elected, qualified and acting governor of the state of Kansas.

3. Your orator further says: The Arkansas river rises in the Rocky mountains, in the said state of Colorado, and flows from its source through the counties of Lake, Chaffee, Fremont, Pueblo, Otero, Bent, and Prowers, in said state, and thence from the last-named county across the line into the state of Kansas.

All tributaries entering the Arkansas river in the state of Colorado have their rise and entire flow in that state. The length of the river in the said state

is, approximately, two hundred and eighty miles, and the drainage area of said river and its tributaries in the said state is, approximately, twenty-two thousand square miles. All of the drainage area of said river is east of the summit of the Rocky mountains, and a large portion of such area is in the mountains, where the fall of snow in the winter season is very great. Deep snows accumulate during the winter season in said mountains and the valleys thereof, which snow melting during the spring and summer, the waters therefrom flow into the river directly and in great volume from the early spring until the month of August in each year. The course of said river, after leaving the mountains of Colorado, proceeds in an easterly direction for, approximately, two hundred miles to the west line of the state of Kansas; and the river in its course, after leaving the mountains, is a navigable stream under the laws and departmental rules and regulations of the United States.

The volume of water in the bed of said river flowing from the state of Colorado into the state of Kansas formerly was, and should now be, and would be, very large but for the wrongful diversion of the same as hereinafter set forth; said volume at its normal height in said river at the mean average flow, for about ten months in the year, being upwards of two thousand cubic feet per second. For a period of about two months in the autumn of each year the normal flow of water in the bed of said river shrinks and is much less than the amount above stated. The tributaries of said river in the state of Kansas are comparatively

few in number, and do not and could not furnish water to cause a continuous stream to flow in the bed of the said river, except near the south line of the state, where the river flows into the territory of Oklahoma.

The said river flowing from the state of Colorado enters the state of Kansas and proceeds through the counties of Hamilton, Kearny, Finney, Gray, Ford, Edwards, Pawnee, Barton, Rice, Sedgwick, Sumner, and Cowley, in the state of Kansas, and therefrom through the territory of Oklahoma, the Indian Territory, and the state of Arkansas, and empties into the Mississippi river at the eastern boundary of that state. From Fort Gibson, in the Indian Territory, to the mouth of said river it is a large, navigable stream, and is used for the purposes of trade and commerce by vessels plying thereon.

The length of the river in the state of Kansas is about three hundred and ten miles. Its course is through a broad valley, and along its entire length within the state of Kansas are alluvial deposits of great depth, amounting, in the aggregate, to about two million five hundred thousand acres. The greater part of the said acreage and the greater part of the course of the river lies in the western half of the state. The elevation of the bed of the river through the state of Kansas is from three thousand three hundred and fifty feet above the level of the sea, at the Colorado line, to one thousand feet above said level at the point where it enters Oklahoma. The rainfall in the drainage area of said river in the western half of the state of Kansas is very light, and, by reason of the porous

nature of the soil throughout said drainage area, the greater portion of the water so falling sinks into the earth, and but a small portion thereof finds its way to said river, except in the event of severe and unusual storms. The ordinary and usual rainfall in the major portion of the valley of said river in the state of Kansas is utterly inadequate to the growing and maturing of cultivated crops of any kind, because, *first*, the precipitation is very scanty; and, *second*, it does not fall during the growing season of the year.

The said river in its entire course through the state of Kansas has a natural fall of about seven and three-tenths feet per mile. The valley of the river is composed of sand covered with alluvial soil, and the river and the surface soil of the bottom lands in the state of Kansas are all underlaid with sand and gravel, through which the waters of said river have flowed from time immemorial, extending in width under the entire valley for its whole length through the state of Kansas. The natural course and flow of said river throughout its entire length in the state of Kansas is in and beneath the bed thereof and beneath the surface of the bottom lands of the entire valley of said river. That portion of the river which flows beneath the surface through the sand and gravel is called the "underflow." The "underflow" is confined to the valley of the river and is coextensive with the valley, and varies in volume with the amount of water in discharge in the river. The water which flows in the river from the state of Colorado into the state of Kansas furnishes the principal and almost the entire supply of

water for the underflow in the valley of said river, and at its normal height the said underflow is of great and lasting benefit to the said bottom lands, both as to those which abut upon said river and as to those which do not; and is of great benefit to the people owning and occupying such lands, for that it furnishes moisture sufficient to grow ordinary farming crops in the absence of rainfall, and furnishes water, at a moderate depth below the surface, for domestic use and for the watering of animals. The flow of water in the river-bed is also of great value to the people in the vicinity by reason of the fact that the evaporation from said river tends to cool and moisten the surrounding atmosphere, thereby greatly promoting the growth of all vegetation, enhancing the value of lands in that vicinity, and conducing directly and materially to the public health and making the locality habitable. Owing to the dryness of the climate, the cloudlessness of the sky, the high elevation, and the prevailing winds, evaporation is rapid and great, being about sixty inches per annum at the east end of the river valley in Kansas, and ninety inches at the west line of the state.

Outside of said valley in the western half of the state of Kansas are several million acres of arid upland and plateau upon which grows a sparse but valuable grass upon which cattle may feed, and upon which they have, in times past, in vast numbers been fed and fattened, but the cattle so fed must have watering-places, and such watering-places must be in the river valley. And the availability and use of the

said arid lands and the prosperity of the business of cattle-feeding thereon depends entirely upon the water, its convenience, depth, and supply, and if the surface flow of water in the bed of said river be wholly cut off from the state of Kansas, then the underflow will gradually diminish and run out, and the valley of the Arkansas river will become as arid and uninhabitable as is the upland and plateau along its course, since without said underflow the valley land will be unfit for cultivation and the arid lands unavailable for grazing.

The bottom lands in the valley of the Arkansas river in the state of Kansas are practically level and rise from six to fifteen feet above the water bed of the river, and are such as are ordinarily termed and will be herein referred to as "bottom lands." Nearly all of said bottom lands, including those which are adjacent to the bed of said river, are fertile and productive, valuable for farming purposes, and well adapted to the growing of corn, wheat, alfalfa, rye, domestic and wild grasses, orchards, fruits, vegetables, and all like crops, grains and grasses usually grown in that latitude of the United States. In addition thereto, all of said lands are valuable for grazing purposes and well adapted to the support of vast numbers of cattle, horses, sheep, and hogs.

Nearly all of the bottom lands of the said Arkansas valley, including those upon the banks of said river, are now owned, held and occupied by persons engaged in agricultural pursuits, and more than three-fourths of the bottom lands of said valley in the state of Kan-

sas were and are occupied by persons owning or leasing said lands and residing thereon with their families. More than two-fifths of said bottom lands so situate in said valley in the state of Kansas, including more than two-fifths of those upon the banks of said river, are in a state of actual cultivation, and have been for many years past; and said lands now have, outside of the cities, an agricultural population of more than fifty thousand persons. The inhabitants of said valley are now, and have been since the first settlement thereof, as hereinafter set forth, engaged in the raising of corn, wheat, rye, alfalfa, hay, fruits, vegetables, cattle, horses, sheep and hogs and other products common to the latitude and climate.

Situated upon the banks of the said river in the state of Kansas are numerous cities, towns, and villages, and among the cities so situated are Syracuse, Garden City, Cimarron, Dodge City, Kinsley, Larned, Great Bend, Sterling, Hutchinson, Wichita, and Arkansas City; all of which cities, except the one last named, are county-seats, and have an aggregate population of over 50,000 persons, whose rights are to a greater or less extent impaired by the wrongs herein complained of.

The actual value of the bottom lands in the valley of the Arkansas river, in the state of Kansas, is from five to one hundred dollars per acre, and the average value of all of the said lands is not less than twenty-five dollars per acre, provided said lands are permitted to receive the benefits arising from the natural and normal flow of water in said river, which benefits

they would receive but for the wrongful acts done in and by the state of Colorado. By reason of the said wrongs, herein complained of, the value of said lands has shrunk many millions of dollars, which has been a direct loss to the citizens of the state of Kansas, and to the taxable wealth, and to the revenues of the state of Kansas and to the school system of the state as hereinafter set forth.

4. Your orator further says: All of the said bottom lands were originally a part of the public domain of the United States, and by the act admitting the state of Kansas into the union the state became entitled, for school purposes, to sections sixteen and thirty-six of each governmental township, some of which sections are situated within the said valley, and a number of which adjoin the bed of said stream.

Under the act of congress of March 3, 1863, entitled "An act for a grant of lands to the state of Kansas in alternate sections to aid in the construction of certain railroads and telegraphs in said state," there was granted to the state practically all of the odd-numbered sections of land in said valley lying north of a line four miles south of the north line of township twenty-six in said state. Said line is about four miles north of the city of Wichita, and extends to the west line of said state; and the grant included all the territory of the Arkansas valley west of Wichita, being four-fifths of said valley. All the requirements and provisions of said act of congress were complied with prior to the year 1874 by the state of Kansas and by the Atchison, Topeka & Santa Fe Railroad Company,

as to such of said lands as were located east of the west line of Ford county in said state as now located. Prior to said year 1874, the fee-simple title to said lands and all rights thereunto appertaining had been certified and conveyed by the United States to the state of Kansas, and by it to the said railroad company.

Between the years 1874 and 1883 the remaining sections of said lands, to wit, those lying west of said west line of Ford county, were so certified, transferred and conveyed to said state and by it conveyed. The amount of the lands so conveyed, which were situate in said valley and were a part of the bottom lands thereof, was not less than nine hundred thousand acres, a large portion of which abut upon and extend to the bed of said river. The other lands in said valley, being the even-numbered sections, were and have been at all times subject to entry as a part of the public domain of the United States and subject to be taken and have been taken and occupied by settlers thereon, under the land laws of the United States.

Prior to the admission of the state of Kansas into the union, in 1861, many persons were settlers and residents of said valley, occupying and holding lands therein, more particularly along the line of the Santa Fe trail, which followed the river from a point near the present site of the city of Hutchinson to the west line of the state. During the years 1869, 1870, and 1871, the entire Arkansas valley, from the south line of the state of Kansas to the city of Great Bend, was taken and occupied by actual settlers, who subse-

quently acquired title to their lands under the laws of the United States of America and by purchase from the state and the said railroad company. The other lands situated in said valley, from Great Bend westward to the west line of the state of Kansas, were taken up during the time between the years 1872 and 1884, and have been occupied ever since by actual settlers and by purchasers from the state and from the said railroad company. All of the lands of said valley have been thus occupied, held and owned by said original settlers and their grantees ever since the above dates of settlement, and these settlers and their successors in interest have continuously held and owned, and do now hold and own, all of the riparian and other rights of every kind and nature in any way appertaining or belonging to said lands.

5. Your orator further says: By an act of the congress of the United States of March 2, 1889, it was enacted that the secretary of the interior be authorized to sell and convey to the state of Kansas lots numbered three, five, six, and seven, of section three, township twenty-seven south, of range twenty-four west, situated in Ford county, Kansas, on condition that the state should within twelve months thereafter pay or cause to be paid the sum of one dollar and twenty-five cents per acre for said lands, and should within three years establish and provide for the maintenance thereon of a home for the care and maintenance of officers, soldiers, sailors and marines who had served in the army and navy, and their dependent parents, widows, or orphans. Thereafter,

and on the 13th day of June, 1889, the state of Kansas made payment to the United States of one dollar and twenty-five cents per acre for said lands, and on said date they were by the secretary of the interior, in pursuance of said act of congress, transferred to the state of Kansas, and it has ever since used said lands for the maintenance of a soldiers' home thereon, in accordance with the provision of the aforesaid act of congress. The lands so used consist of one hundred and twenty-six and fifty-six one-hundredths acres of the bottom lands of the Arkansas valley, adjoining and abutting upon the bed of said river. Said land is fertile and of a character well adapted to the raising of grain, fruits and vegetables when supplied with moisture. The natural rainfall in the vicinity is slight and insufficient for the maturing of crops, fruits, and vegetables, and the value of said lands for farming purposes depends entirely upon the flow of water in the bed of the river and upon the underflow beneath the land. The state of Kansas is now, and has, during its entire ownership of said tract, used a large portion of the same for the raising of grains, fruits, vegetables and grasses thereon for the needs of its said institution, and as the owner of said land, the state of Kansas, is now and has been since 1889 entitled to the full, free and natural flow of all waters which naturally would flow in said river and beneath said land; and the rights of the state thereto are prior and superior to any right or claim of the state of Colorado accruing, acquired or established subsequent to said date.

6. Your orator further says: The state of Kansas is the owner of the fee-simple title to the northeast quarter (¼), the east half of the northwest quarter (¼), the southwest quarter (¼), and the southeast quarter (¼) of section nineteen (19), and the south half of the southeast quarter (¼) of section eighteen (18), all in township twenty-three (23) south, range five (5) west of the sixth principal meridian, situated in Reno county, Kansas, and has owned said lands since the year 1885. The state of Kansas has erected upon said lands a large institution built and used for the purpose of an industrial reformatory, where are confined and detained large numbers of the criminals of the state. The greater portion of the said lands so owned by the state are suitable for and are used for farming purposes in connection with said institution, and for the growing of grain, grasses, fruits and vegetables for the needs of said institution. Said lands consist of about six hundred and forty (640) acres, and are situated within the valley of the Arkansas river, and are bottom lands furnished with moisture, sufficient for the growing of crops thereon, solely from the underflow of said river, and the rainfall upon said lands in ordinary seasons is naturally inadequate.

The state of Kansas acquired the title to said reformatory lands from divers persons and individuals who had previously owned and occupied them, and the title to all that portion of said lands situate in section nineteen passed from the United States to the state of Kansas under and in pursuance of the act of congress approved March 3, 1863, granting certain

lands to the state of Kansas to aid in the construction of certain railroads, and said lands were located and were certified to the state of Kansas April 9, 1873; and on the 19th day of May, 1873, the said section of land, with other lands, were patented by the state of Kansas to the Atchison, Topeka & Santa Fe Railroad Company. In and by said act of congress and the certification and location of said lands thereunder and the patent aforesaid, the full fee-simple title to said lands and all rights appertaining thereto were transferred from the United States of America to said railroad company, and said title and rights have passed by successive conveyances through various parties to the state of Kansas, and were acquired by it on August 14, 1885, as aforesaid, and have been ever since held by it. The title to that portion of said reformatory lands situate in section eighteen passsed from the United States to one George S. Laverty, by a patent dated September 25, 1878, at which time said Laverty acquired the fee-simple title to said premises and all rights appertaining thereto, all of which relate back to and date from the time of his entry upon said lands, more than five years prior thereto. Said title and rights in and to said lands have passed by successive conveyances until they are now vested in the state of Kansas as aforesaid; and the state is now, and has been since August 15, 1885, the owner in fee simple of said tract of land and all rights thereunto appertaining. By reason of the foregoing, the state of Kansas is entitled to the full natural flow of the water of the Arkansas river in its accus-

tomed place and at its normal height and in its natural volume underneath all of the said reformatory lands. The rights of the state thereto relate back to May 19, 1873, and are prior and superior to any right or claim of the state of Colorado accruing, acquired or established subsequent to said date.

7. Your orator further says: By the constitution of the state of Colorado, adopted at or about the time of the admission of said state into the union, and not since abrogated by the people of said state, it is provided in article fifteen thereof as follows:

"SEC. 5. The water of every natural stream not heretofore appropriated within the state of Colorado is hereby declared to be the property of the public, and the same is dedicated to the uses of the people of the state subject to appropriation as hereinafter provided.

"SEC. 6. The right to divert unappropriated waters of any natural stream for beneficial uses shall never be denied. Priority of appropriation shall give the better right as between those using the water for the same purposes; but when the waters of any natural stream are not sufficient for the service of all, those using the water for domestic purposes shall have the preference over those claiming for any other purpose, and those using the water for agricultural purposes shall have the preference over those using the same for manufacturing purposes."

The legislature of the state of Colorado has from time to time passed divers and numerous laws purporting and pretending to authorize the diversion of water from said Arkansas river and its tributaries, in said state, for uses and purposes other than domestic; more particularly for the purpose of irrigating arid and waste lands for agricultural purposes in

said state. In and by its said laws and through its officers and courts the said state has pretended to grant to divers persons, firms and corporations the right and authority to divert the waters of the Arkansas river and its tributaries, in Colorado, from their natural channels, and to cause said waters to flow into and through canals and ditches constructed for the purpose, extending great distances away from the natural channels of said streams, and to store said waters and to empty the same upon high arid lands, not riparian to said streams, where large portions of such waters are lost from evaporation, and the remainder sinks into the earth, as a result of which, all of said waters are forever lost to such streams and are thus and thereby prevented from flowing into or through the state of Kansas.

Under and in pursuance of said constitutional provisions and the statutes of the state of Colorado, upwards of one hundred and fifty persons, firms and corporations claim to have acquired rights to divert water from said river and its tributaries, in the state of Colorado, for the purpose of irrigating such arid non-riparian lands in said state; and each of said persons, firms and corporations owns one or more ditches or canals to carry said waters from the natural courses of said streams. Many of said canals and ditches are of great capacity, and are many miles in length. Many of said persons, firms and corporations have constructed great reservoirs within which to store, and in which are stored for use, vast quantities of the water

of said streams before using it for the purpose of irrigation, as herein set forth.

Said ditch owners, together with the state of Colorado, as hereafter set forth, are now diverting and at all times continue to divert from their natural courses the waters flowing in the bed of the Arkansas river and its tributaries, in said state, and are now carrying said waters to great distances from their natural courses and discharging them for agricultural purposes upon arid and non-riparian lands, where such waters are wholly lost to such streams and to the state of Kansas and its inhabitants. That such diversion is carried to such an extent that no water flows in the bed of said river from the state of Colorado into the state of Kansas during the annual growing season, and the underflow of said river in Kansas is diminishing and continuing to diminish, and if the said diversion continues to increase, the bottom lands of said valley will be injured to an enormous extent, and a large portion thereof will be utterly ruined and will become deserted and be a part of an arid desert.

The state of Colorado, through its laws, legislatures, officers, and agents, pretends to authorize and license the owners of said canals and ditches to take, carry away and so use the waters of said streams; and the state of Colorado, in addition to granting the right to take and use the water, also claims the right to regulate and control the distribution of such water by canal and ditch owners to the owners of lands so irrigated, and grants permission and license to landowners of said state to take and receive the waters

flowing in said canals and ditches and use the same for irrigation purposes. In addition to the foregoing, other canals and ditches for the diversion of waters from said river and its tributaries are contemplated for the purpose of irrigating arid non-riparian lands; and the extension of branches and laterals to those canals and ditches now built are contemplated and intended by the people of the state of Colorado; as is also the obtaining of additional privileges not heretofore granted for the diversion of water from said river, and its tributaries, and the irrigation of lands not now irrigated. The extension of said irrigation system in the drainage area of the Arkansas Valley, in the state of Colorado, is being continuously carried on; and unless restrained therefrom the state of Colorado will grant additional rights or pretended rights for the construction of other canals and ditches sufficient to divert all the water in the river, so that none will flow into the state of Kansas.

The state of Colorado has, since the year 1890, at and near the city of Canon City, in said state, constructed a great canal for the purpose of diverting water of the Arkansas river from its channel at said point and using the water for irrigation purposes upon arid non-riparian lands, so that the water will not return to or again flow in said river; which said canal is now owned, controlled and managed by the state of Colorado. The said state authorizes, directs and permits its agents and employees so to divert from said river into said canal water to the amount of seven hundred and fifty-six and $\frac{28}{100}$ cubic

feet per second, thereby greatly diminishing the flow of water in the river, which said amount is approximately the natural flow of said river at the place of said diversion. The diversion of said water from said river through said canal is continued during the entire season within which annual crops are grown and matured in the state of Kansas and throughout the entire season in which the water is needed in the state of Kansas; and said water so diverted and taken, is sold by the state of Colorado to persons owning lands in the vicinity of said canal, and the water is used by such owners for irrigating such arid non-riparian lands. The waters so diverted from said river by the state of Colorado would otherwise flow into the state of Kansas and through said valley, and be vastly beneficial.

The state of Colorado intends and is threatening to build, and will build or cause to be built, unless restrained therefrom, other canals similar in size, character, and design, with the purpose and intention of forever diverting other large quantities of water from said river and irrigating other arid non-riparian lands, and the legislature of the state of Colorado has authorized the construction of other such canals along the river in said state. The said canal constructed by the state of Colorado is not yet completed, and only a portion of the arid non-riparian lands subject to irrigation therefrom, as it is now constructed, is receiving water from said canal. The state of Colorado intends to, and will, unless restrained by this court, extend said canal and

build branches and laterals thereto, and will use water diverted from said river to irrigate arid non-riparian lands not now or ever previously irrigated.

The said state of Colorado has, by and through legislation, made large appropriations of money for the construction and erection of reservoirs within its territory for the storage of water from streams tributary to the Arkansas river in said state, and has provided boards of control to have charge of the construction, maintenance and operation of such reservoirs, and has provided that the waters so stored in reservoirs may be sold and disposed of for the purpose of being used in the irrigation of lands which are arid and non-riparian to the streams from which such waters are taken. And your orator further states, upon information and belief, that the said state of Colorado has since the year 1891 erected and constructed and is now using not less than four of such reservoirs—one in each of the counties of Custer, El Paso, Chaffee, and Las Animas—each of which reservoir takes, stores and holds vast quantities of water which would otherwise flow into the state of Kansas; and, by reason of the use of said waters as aforesaid, no portion thereof is permitted to return to its natural channel or flow in said river.

The said state of Colorado is now preparing to construct and intends to construct, and unless restrained therefrom will construct, within its territory and near the said river and its tributaries, and at various points along the valley thereof, vast reservoirs within which to further store and hold the natural and the flood

waters of said stream; and it is the intention and expectation of said state so to store and withhold and divert from the channel of said river all of the water thereof. And your orator states, upon information and belief, that surveys for such reservoirs have been made, and plans and specifications are being prepared for the construction of such reservoirs, and the state is preparing to enter upon the construction thereof. If said reservoirs are so constructed by the state of Colorado, vast and enormous quantities of water which would otherwise flow in the river into the state of Kansas will be taken and held, and will be sold and used for the irrigation of arid and non-riparian lands not now irrigated, and will be forever lost to said river and the state of Kansas. Such an event will cause great distress in the state of Kansas in said valley, and will cause a vast and ruinous decline in agriculture, and great diminution in the wealth and revenues of the state of Kansas, and a great diminution in its population and prosperity. And your orator believes, and so charges the facts to be, that it is the intention of the state of Colorado to divert absolutely all of the water that does, can or might flow down the Arkansas river into the state of Kansas, so that all of the water shall be used in the state of Colorado, and none whatever, either above or below the surface, that may by any possibility be utilized, shall cross the line into the state of Kansas, all to the great profit and advantage of the state of Colorado; and to the great damage and injury of the state of Kansas.

When the territory of Kansas was organized, in the year 1854, it extended from its present eastern boundary to the summit of the Rocky mountains, and all of the present drainage area of the Arkansas river in Colorado was then included in the territory of Kansas, and during all of the period from then to the organization of the state of Kansas the water of said river was wholly unappropriated, and the common law and the riparian rights herein claimed extended over the whole of the Arkansas valley and to the summits of the Rocky mountains, and had for many years prior thereto. By reason of the prior settlement, occupation and title of the inhabitants of the state of Kansas upon and to the lands situate in the valley of said river, including those upon the banks of said river, the state of Kansas and the owners of land in said valley did acquire, and now have the right to, the uninterrupted and unimpeded flow of all of the waters of said river into and across the state of Kansas. The rights so claimed by your orator accrued prior to any of the said diversions by or in the state of Colorado, and prior to the accruing of any of the pretended rights claimed by the state of Colorado, or by persons, firms or corporations now taking water from said river or its tributaries.

8. Your orator further says: The state of Colorado and the various persons, firms and corporations engaged in taking waters from said river and its tributaries as aforesaid, under and in pursuance of authority and license pretended to be granted therefor by the state of Colorado, have by so doing wrongfully, illegally and

unlawfully diverted said water from the accustomed channel into and across the state of Kansas, and have greatly damaged and have irreparably injured the state of Kansas and the inhabitants thereof. And by reason of said diversion of water the fertility of all of the lands in said valley, including those upon the banks of said river as well as others, has been greatly diminished. During the spring and early summer, when crops are growing upon said valley lands in Kansas, the diversion of water in Colorado, as aforesaid, withholds from said Kansas valley lands, and particularly those upon the banks of said river, and those belonging to the state of Kansas above described, the waters to which said lands are entitled, with the result that the crops, trees and vegetation growing thereon languish and decline and in many places wither and perish; and wells which should furnish water for domestic use and animals become dry. The said damages are the proximate and necessary result of the diversion of said waters as aforesaid; and the amount of such damage is enormous and beyond computation, and amounts to vast sums annually, and such damages have increased year by year for the past ten years, substantially in proportion as the diversion of said waters in the state of Colorado has increased. If said persons, firms and corporations be permitted to increase the amount of water which they shall take from said river and its tributaries in Colorado, or if other persons, firms or coporations be permitted to take additional water from said river and its tributaries, the damage suffered, as aforesaid, by

the state of Kansas and the inhabitants of said valley will continue to increase.

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That by reason of the diversion of said waters, as herein described, during the summer season and during the dry portion of the year, when there is neither rainfall in the state of Kansas nor melting snows in the state of Colorado, the bed of said river in the state of Kansas above the city of Wichita becomes practically and oftentimes wholly dry. The bed of said stream, through the territory above described, is without high banks, and, in its natural condition, was but a few inches or a few feet below the bottom lands adjacent thereto. These adjacent bottom lands are of a loose, sandy loam, and are unprotected on either side by hills or mountains, or by any natural forests, and the bed of said stream is almost wholly of sand. During said dry portion of the year said territory is subject to high and constant winds, and said winds change and fill up the bed of the stream and the natural channel thereof with drifting sand, dirt, and debris, until it is practically level with the lands adjacent thereto, and said obstructions are rapidly becoming permanent by growing vegetation, willows, and trees. And at the times of sudden and excessive rainfall in the state of Kansas, or sudden and excessive melting of the snows in the state of Colorado, the flood waters thereof cannot and do not flow down the natural channel of said river, now filled and obstructed as aforesaid, but overflow said adjacent bottom lands, washing channels therethrough, depositing dirt and debris thereon, and doing great damage to stock pastured, crops grown and improvements situate thereon, and greatly injuring and decreasing the value of said lands.

the state of Kansas and the inhabitants of said valley will continue to increase.

The property of your orator situated upon the banks of the river near Dodge City, and used for the purpose of a soldiers' home, as aforesaid, has been greatly damaged and specially injured by reason of the diversion from its channel of the water which would otherwise flow in the said river by and underneath the said tract of land. Its fertility has been greatly diminished, its water-supply lessened, and its salubrity and utility impaired, and, unless the natural and normal flow of water is restored, the value of said property will be entirely destroyed, and the same will be rendered unfit for use as a soldiers' home, or for any purpose whatever. And the same is true of the property of your orator situate near the city of Hutchinson, and used for the purpose of a state industrial reformatory. If greater amounts of water are to be taken from said river in the state of Colorado, and if the water flowing therein shall be retained and used in said state by the owners of canals and ditches or by the state of Colorado, the value of said land will be taken away and the utility of said institution wholly destroyed.

9. Your orator further says: A large number of the irrigation canals and ditches now wrongfully used as aforesaid in diverting the waters of the Arkansas river and its tributaries from their accustomed channels in said state of Colorado are owned and operated by domestic corporations organized for that purpose

under the laws of the state of Colorado, with limited periods of existence. If the state of Colorado be not restrained from so doing, it will, at or about the termination of the existence of such corporations, grant unto them new charters or extensions of the charters now held; and said state will, unless restrained by this court, grant other and new charters to corporations organized for the purpose of unlawfully and wrongfully diverting and using said waters for irrigation purposes, all to the great damage and irreparable injury of the state of Kansas and its inhabitants.

10. WHEREFORE, Your orator prays the aid of this honorable court, and asks that a decree may be entered prohibiting, enjoining and restraining the state of Colorado from granting, issuing, or permitting to be granted or issued hereafter, any charter, license, permit or authority to any person, firm or corporation for the diversion of any of the waters of the Arkansas river or of any of its tributaries from their natural beds, courses and channels within the state of Colorado, except for domestic use; and from granting to any person, firm or corporation any right to extend or enlarge any of the canals or ditches now existing; or to construct and operate any other canals, ditches, branches, laterals or reservoirs in addition to those heretofore constructed and now in use in said state.

Your orator further prays, that the said state of Colorado may be prohibited, enjoined, and restrained, as a State, from itself constructing, owning, or oper-

ating, either directly or indirectly, any canal or ditch whereby the waters of said river, or any of its tributaries, shall be diverted from their natural courses and channels; and from constructing, owning, operating or using any reservoir for the storage of the waters of said river, or any of its tributaries, for purposes of irrigation.

Your orator further prays, that the said state of Colorado may be prohibited, enjoined and restrained from granting to any person, firm or corporation any extension of any charter, license, permit, or authority, of any kind or nature whatsoever, for the diversion of any of said waters from said river or its tributaries for irrigation purposes, or for the continuance of such diversion thereof after the charter, license, permit or authority theretofore granted for that purpose shall have expired.

Your orator further prays, that it may have such other and further relief in the premises as the nature of the circumstances of this case may require and as to this honorable court shall seem meet.

FORASMUCH, THEREFORE, As your orator is without remedy in the premises except in a court of equity, may it please your honors to grant unto your orator not only a writ of injunction conformable to the prayer of this bill, but also a writ of subpœna of the United States of America directed to the state of Colorado, to be served upon the governor and attorney general of said state, commanding it on a day certain, therein to be named, and under a certain penalty, to be and appear before your honorable

court, then and there to answer all and singular the allegations of the foregoing bill, and to abide and perform such order and decree in the premises as may be awarded against the said state.

And your orator, as in duty bound, will ever pray, etc.

A. A. Godard

Attorney General of the State of Kansas, and Solicitor for Complainant.

S. S. Ashbaugh O. T. Ware

Of Counsel.

J. Strut-
Asst. Atty. General

FILE COPY.

Office Supreme Court U. S.
FILED
AUG 17 1903
JAMES H. McKENNEY,
Clerk.

3 Orig'l.
C.T.1906

In the Supreme Court

of the United States.

THE STATE OF KANSAS,
Complainant,
vs.
THE STATE OF COLORADO *et al.*,
Defendants.

No. 3 Orig.

AMENDED BILL IN EQUITY.

C. C. COLEMAN,
Attorney-general of the State of Kansas.

N. H. LOOMIS,
F. DUMONT SMITH,
S. S. ASHBAUGH,
Of Counsel.

In the Supreme Court
of the United States.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your orator, The State of Kansas, brings this its amended Bill of Complaint against the State of Colorado, and The Bessemer Ditch Company, a corporation; The Oxford Farmers' Ditch Company, a corporation; The Otero Canal Company, a corporation; The Lake Canal Company, a corporation; The Riverside Ditch Company, a corporation; The Catlin Consolidated Canal Company, a corporation; The Graham Ditch Company, a corporation; The Lamar Land and Canal Company, a corporation; the Amity Canal and Reservoir Company, a corporation; The Rocky Ford Canal, Reservoir, Land, Loan and Trust Company, a corporation; The Fort Lyon Canal Company, a corporation; The Colorado Land and Canal Company, a corporation; The Great Plains Water Company, a corporation; The Arkansas Valley Sugar-beet and Irrigated Land Company, a corporation; The Colorado Fuel and Iron Company, a corporation; and The

Bent-Otero Improvement Company, a corporation, and avers:

1. The state of Kansas is one of the United States of America, admitted into the union January 29, 1861. The state of Colorado is one of the United States of America, admitted into the union August 1, 1876. Each of the other parties defendant herein is a corporation organized, chartered and authorized to transact business under and by virtue of the laws of the state of Colorado, and owns, maintains and operates a ditch or ditches, canal or canals in the state of Colorado by and by means of which the waters of the Arkansas river and its tributaries are diverted and used as hereinafter set forth.

2. The original bill in these proceedings was exhibited and these proceedings instituted by direction of the Hon. W. E. Stanley, the duly elected, qualified and acting governor of the state of Kansas, and this amended bill is exhibited and these further proceedings prosecuted by direction of Hon. Willis J. Bailey, the present and duly elected, qualified and acting governor of said state of Kansas.

3. Your orator further says: The Arkansas river rises in the Rocky mountains, in the said state of Colorado, and flows from its source through the counties of Lake, Chaffee, Fremont, Pueblo, Otero, Bent, and Prowers, in said state,

and thence from the last-named county across the line into the state of Kansas.

All tributaries entering the Arkansas river in the state of Colorado have their rise and entire flow in that state. The length of the river in the said state is, approximately, two hundred and eighty miles, and the drainage area of said river and its tributaries in the said state is, approximately, twenty-two thousand square miles. All of the drainage area of said river is east of the summit of the Rocky mountains, and a large portion of such area is in the mountains, where the fall of snow in the winter season is very great. Deep snows accumulate during the winter season in said mountains and the valleys thereof, which snow melting during the spring and summer, the waters therefrom flow into the river directly and in great volume from the early spring until the month of August in each year. The course of said river, after leaving the mountains of Colorado, proceeds in an easterly direction for, approximately, two hundred miles to the west line of the state of Kansas; and the river in its course, after leaving the mountains, is a navigable stream under the laws and departmental rules and regulations of the United States.

That the lands bordering upon the Arkansas river and its tributaries in the state of Colorado are of such a character that they are not saturated to an appreciable extent by the waters flowing in

said river or its tributaries, and that said lands are arid and barren up to the very margin of said streams.

The volume of water in the bed of said river flowing from the state of Colorado into the state of Kansas formerly was, and should now be, and would be, very large but for the wrongful diversion of the same as hereinafter set forth; said volume at its normal height in said river at the mean average flow, at the state line, for about ten months in the year, being upwards of two thousand cubic feet per second. For a period of about two months in the autumn of each year the normal flow of water in the bed of said river shrinks and is much less than the amount above stated. The tributaries of said river in the state of Kansas are comparatively few in number, and do not and could not furnish water to cause a continuous stream to flow in the bed of the said river, except near the south line of the state, where the river flows into the territory of Oklahoma.

The said river flowing from the state of Colorado enters the state of Kansas and proceeds through the counties of Hamilton, Kearny, Finney, Gray, Ford, Edwards, Pawnee, Barton, Rice, Sedgwick, Sumner, and Cowley, in the state of Kansas, and therefrom through the territory of Oklahoma, the Indian Territory, and the state of Arkansas, and empties into the Mississippi river at the eastern boundary of that state. From Fort

Gibson, in the Indian Territory, to the mouth of said river it is a large, navigable stream, and is used for the purposes of trade and commerce by vessels plying thereon.

The length of the river in the state of Kansas is about three hundred and ten miles. Its course is through a broad valley, and along its entire length within the state of Kansas are alluvial deposits of great depth, amounting, in the aggregate, to about two million five hundred thousand acres. The greater part of the said acreage and the greater part of the course of the river lies in the western half of the state. The elevation of the bed of the river through the state of Kansas is from three thousand three hundred and fifty feet above the level of the sea, at the Colorado line, to one thousand feet above said level at the point where it enters Oklahoma. The rainfall in the drainage area of said river in the western half of the state of Kansas is very light, and, by reason of the porous nature of the soil throughout said drainage area, the greater portion of the water so falling sinks into the earth, and but a small portion thereof finds its way to said river, except in the event of severe and unusual storms. The ordinary and usual rainfall in the major portion of the valley of said river in the state of Kansas is utterly inadequate to the growing and maturing of cultivated crops of any kind, because, *first*, the precipitation is very scanty; and, *second*, it

does not fall during the growing season of the year.

The said river in its entire course through the state of Kansas has a natural fall of about seven and three-tenths feet per mile. The valley of the river in the state of Kansas is composed of sand covered with alluvial soil, and the river and the surface soil of the bottom lands in the state of Kansas are all underlaid with sand and gravel, through which the waters of said river have flowed from time immemorial, extending in width under the entire valley for its whole length through the state of Kansas. The natural course and flow of said river throughout its entire length in the state of Kansas is in and beneath the bed thereof and beneath the surface of the bottom lands of the entire valley of said river. That portion of the river which flows beneath the surface through the sand and gravel is called the "underflow." The "underflow" is confined to the valley of the river in the state of Kansas, and is coextensive with the valley in said state, and varies in volume with the amount of water in discharge in the river. There is no underflow to said river in the state of Colorado except in and under the bed of said river. The water which flows in the river from the state of Colorado into the state of Kansas furnishes the principal and almost the entire supply of water for the underflow in the valley

of said river, and at its normal height the said underflow is of great and lasting benefit to the said bottom lands, both as to those which abut upon said river and as to those which do not; and is of great benefit to the people owning and occupying such lands, for that it furnishes moisture sufficient to grow ordinary farming crops in the absence of rainfall, and furnishes water, at a moderate depth below the surface, for domestic use and for the watering of animals. The flow of water in the river-bed is also of great value to the people in the vicinity by reason of the fact that the evaporation from said river tends to cool and moisten the surrounding atmosphere, thereby greatly promoting the growth of all vegetation, enhancing the value of lands in that vicinity, and conducing directly and materially to the public health and making the locality habitable. Owing to the dryness of the climate, the cloudlessness of the sky, the high elevation, and the prevailing winds, evaporation is rapid and great, being about sixty inches per annum at the east end of the river valley in Kansas, and ninety inches at the west line of the state.

Outside of said valley in the western half of the state of Kansas are several million acres of arid upland and plateau upon which grows a sparse but valuable grass upon which cattle may feed, and upon which they have, in times past, in

vast numbers been fed and fattened, but the cattle so fed must have watering-places, and such watering-places must be in the river valley. And the availability and use of the said arid lands and the prosperity of the business of cattle-feeding thereon depend entirely upon the water, its convenience, depth, and supply, and if the surface flow of water in the bed of said river be wholly cut off from the state of Kansas, then the underflow will gradually diminish and run out, and the valley of the Arkansas river will become as arid and uninhabitable as are the upland and plateau along its course, since without said underflow the valley land will be unfit for cultivation and the arid lands unavailable for grazing.

The bottom lands in the valley of the Arkansas river in the state of Kansas are practically level and rise from three to fifteen feet above the water bed of the river, and are such as are ordinarily termed and will be herein referred to as "bottom lands." Nearly all of said bottom lands, including those which are adjacent to the bed of said river, are fertile and productive, valuable for farming purposes, and well adapted to the growing of corn, wheat, alfalfa, rye, domestic and wild grasses, orchards, fruits, vegetables, and all like crops, grains and grasses usually grown in that latitude of the United States. In addition thereto, all of said lands are valuable for grazing

purposes and well adapted to the support of vast numbers of cattle, horses, sheep, and hogs.

Nearly all of the bottom lands of the said Arkansas valley, including those upon the banks of said river, are now owned, held and occupied by persons engaged in agricultural pursuits, and more than three-fourths of the bottom lands of said valley in the state of Kansas were and are occupied by persons owning or leasing said lands and residing thereon with their families. More than two-fifths of said bottom lands so situate in said valley in the state of Kansas, including more than two-fifths of those upon the banks of said river, are in a state of actual cultivation, and have been for many years past; and said lands now have, outside of the cities, an agricultural population of more than 50,000 persons. The inhabitants of said valley are now, and have been since the first settlement thereof, as hereinafter set forth, engaged in the raising of corn, wheat, rye, alfalfa, hay, fruits, vegetables, cattle, horses, sheep and hogs and other products common to the latitude and climate.

Situated upon the banks of said river in the state of Kansas are numerous cities, towns, and villages, and among the cities so situated are Syracuse, Garden City, Cimarron, Dodge City, Kinsley, Larned, Great Bend, Sterling, Hutchinson, Wichita, and Arkansas City; all of which cities, except the one last named, are county-

seats, and have an aggregate population of over 60,000 persons, whose rights are to a greater or less extent impaired by the wrongs herein complained of.

The actual value of the bottom lands in the valley of the Arkansas river, in the state of Kansas, is from five to one hundred dollars per acre, and the average value of all of the said lands is not less than twenty-five dollars per acre, provided said lands are permitted to receive the benefits arising from the natural and normal flow of water in said river, which benefits they would receive but for the wrongful acts done in and by the defendants herein named. By reason of the said wrongs, herein complained of, the value of said lands has shrunk many millions of dollars, which has been a direct loss to the citizens of the state of Kansas, and to the taxable wealth, and to the revenues of the state of Kansas and to the school system of the state as hereinafter set forth.

4. Your orator further says: All of the said bottom lands were originally a part of the public domain of the United States, and by the act admitting the state of Kansas into the union the state became entitled, for school purposes, to sections sixteen and thirty-six of each governmental township, some of which sections are situated within the said valley, and a number of which adjoin the bed of said stream.

Under the act of congress of March 3, 1863, entitled "An act for a grant of lands to the state of Kansas in alternate sections to aid in the construction of certain railroads and telegraphs in said state," there was granted to the state practically all of the odd-numbered sections of land in said valley lying north of a line four miles south of the north line of township twenty-six in said state. Said line is about four miles north of the city of Wichita, and extends to the west line of said state; and the grant included all the territory of the Arkansas valley west of Wichita, being four-fifths of said valley. All the requirements and provisions of said act of congress were complied with prior to the year 1874 by the state of Kansas and by the Atchison, Topeka & Santa Fe Railroad Company, as to such of said lands as were located east of the west line of Ford county in said state as now located. Prior to said year 1874, the fee-simple title to said lands and all rights thereunto appertaining had been certified and conveyed by the United States to the state of Kansas, and by it to the said railroad company.

Between the years 1874 and 1883 the remaining sections of said lands, to wit, those lying west of said west line of Ford county, were so certified, transferred and conveyed to said state and by it conveyed. The amount of the lands so conveyed, which were situate in said valley and were a part of the bottom lands thereof, was not

less than nine hundred thousand acres, a large portion of which abut upon and extend to the bed of said river. The other lands in said valley, being the even-numbered sections, were and have been at all times subject to entry as a part of the public domain of the United States and subject to be taken and have been taken and occupied by settlers thereon, under the land laws of the United States.

Prior to the admission of the state of Kansas into the union, in 1861, many persons were settlers and residents of said valley, occupying and holding lands therein, more particularly along the line of the Santa Fe trail, which followed the river from a point near the present site of the city of Hutchinson to the west line of the state. During the years 1869, 1870, and 1871, the entire Arkansas valley, from the south line of the state of Kansas to the city of Great Bend, was taken and occupied by actual settlers, who subsequently acquired title to their lands under the laws of the United States of America and by purchase from the state and the said railroad company. The other lands situated in said valley, from Great Bend westward to the west line of the state of Kansas, were taken up during the time between the years 1872 and 1884, and have been occupied ever since by actual settlers and by purchasers from the state and from the said railroad company. All of the lands of said valley have been

thus occupied, held and owned by said original settlers and their grantees ever since the above dates of settlement, and these settlers and their successors in interest have continuously held and owned, and do now hold and own, all of the riparian and other rights of every kind and nature in any way appertaining or belonging to said lands.

And your orator further shows, that all the territory of the state of Kansas became part of the territory of the United States by the treaty with the French republic of the 30th of April, 1803, ceding Louisiana. That while said territory now within the state of Kansas so belonged to the United States, the government and proper department thereof meandered the bed of said river, and established the meander or boundary lines thereof, and said river from its mouth at the Mississippi river to the Colorado line became, was, is and has always been treated as a navigable river, and the bed of said river within said state of Kansas has never been sold or conveyed by the United States. That when Kansas was admitted into the union as one of the United States, the title and control of the bed of said river within said state of Kansas passed to the state of Kansas, and that the state of Kansas, ever since the 29th day of January, 1861, has been, and now is, the absolute owner thereof, and the absolute and unrestricted right thereto ever since said date has been and

now is vested in the state of Kansas, in trust forever for the benefit of the whole people thereof.

5. Your orator further says: By an act of the congress of the United States of March 2, 1889, it was enacted that the secretary of the interior be authorized to sell and convey to the state of Kansas lots numbered three, five, six, and seven, of section three, township twenty-seven south, of range twenty-four west, situated in Ford county, Kansas, on condition that the state should within twelve months thereafter pay or cause to be paid the sum of one dollar and twenty-five cents per acre for said lands, and should within three years establish and provide for the maintenance thereon of a home for the care and maintenance of officers, soldiers, sailors and marines who had served in the army and navy, and their dependent parents, widows, or orphans. Thereafter, and on the 13th day of June, 1889, the state of Kansas made payment to the United States of one dollar and twenty-five cents per acre for said lands, and on said date they were by the secretary of the interior, in pursuance of said act of congress, transferred to the state of Kansas, and it has ever since used said lands for the maintenance of a soldiers' home thereon, in accordance with the provision of the aforesaid act of congress. The lands so used consist of one hundred and twenty-six and fifty-six one-hundredths acres of the bottom lands of the Arkansas valley, adjoining and

abutting upon the bed of said river. Said land is fertile and of a character well adapted to the raising of grain, fruits and vegetables when supplied with moisture. The natural rainfall in the vicinity is slight and insufficient for the maturing of crops, fruits, and vegetables, and the value of said lands for farming purposes depends entirely upon the flow of water in the bed of the river and upon the underflow beneath the land. The state of Kansas is now, and has, during its entire ownership of said tract, used a large portion of the same for the raising of grains, fruits, vegetables and grasses thereon for the needs of its said institution, and, as the owner of said land, the state of Kansas is entitled to the full, free and natural flow of all waters which naturally would flow in said river and beneath said land; and the rights of the state thereto are prior and superior to the rights or claims of any of said defendants or any other persons whatsoever.

6. Your orator further says: The state of Kansas is the owner of the fee-simple title to the northeast quarter ($\frac{1}{4}$), the east half of the northwest quarter ($\frac{1}{4}$), the southwest quarter ($\frac{1}{4}$), and the southeast quarter ($\frac{1}{4}$) of section nineteen (19), and the south half of the southeast quarter ($\frac{1}{4}$) of section eighteen (18), all in township twenty-three (23) south, range five (5) west of the sixth principal meridian, situated in Reno county, Kansas, and has owned said lands since the year

1885. The state of Kansas has erected upon said lands a large institution built and used for the purpose of an industrial reformatory, where are confined and detained large numbers of the criminals of the state. The greater portion of the said lands so owned by the state is suitable for and is used for farming purposes in connection with said institution, and for the growing of grain, grasses, fruits and vegetables for the needs of said institution. Said lands consist of about six hundred and forty (640) acres, and are situated within the valley of the Arkansas river, and are bottom lands furnished with moisture, sufficient for the growing of crops thereon, solely from the underflow and saturating waters of said river, and the rainfall upon said lands in ordinary seasons is naturally inadequate.

The state of Kansas acquired the title to said reformatory lands from divers persons and individuals who had previously owned and occupied them. The title to all that portion of said lands situate in section nineteen passed from the United States to the state of Kansas under and in pursuance of the act of congress approved March 3, 1863, granting certain lands to the state of Kansas to aid in the construction of certain railroads, and said lands were located and were certified to the state of Kansas April 9, 1873; and on the 19th day of May, 1873, the said section of land, with other lands, were patented by

the state of Kansas to the Atchison, Topeka & Santa Fe Railroad Company. In and by said act of congress and the certification and location of said lands thereunder and the patent aforesaid, the full fee-simple title to said lands and all rights appertaining thereto were transferred from the United States of America to said railroad company, and said title and rights have passed by successive conveyances through various parties to the state of Kansas, and were acquired by it on August 14, 1885, as aforesaid, and have been ever since held by it. The title to that portion of said reformatory lands situate in section eighteen passed from the United States to one George S. Laverty, by a patent dated September 25, 1878, at which time said Laverty acquired the fee-simple title to said premises and all rights appertaining thereto, all of which relate back to and date from the time of his entry upon said lands, more than five years prior thereto. Said title and rights in and to said lands have passed by successive conveyances until they are now vested in the state of Kansas as aforesaid; and the state is now, and has been since August 15, 1885, the owner in fee simple of said tract of land and all rights thereunto appertaining. By reason of the foregoing, the state of Kansas is entitled to the full natural flow of the water of the Arkansas river in its accustomed place and at its normal height and in its natural volume under-

neath all of the said reformatory lands. The rights of the state thereto are prior and superior to any right or claim of any of said defendants or any other persons whatsoever.

7. Your orator further says: By the constitution of the state of Colorado, adopted at or about the time of the admission of the state into the union, and not since abrogated by the people of said state, it is provided in article fifteen thereof as follows:

"SEC. 5. The water of every natural stream not heretofore appropriated within the state of Colorado is hereby declared to be the property of the public, and the same is dedicated to the uses of the people of the state subject to appropriation as hereinafter provided.

"SEC. 6. The right to divert unappropriated waters of any natural stream for beneficial uses shall never be denied. Priority of appropriation shall give the better right as between those using the water for the same purposes; but when the waters of any natural stream are not sufficient for the service of all, those using the water for domestic purposes shall have the preference over those claiming for any other purpose, and those using the water for agricultural purposes shall have the preference over those using the same for manufacturing purposes."

The legislature of the state of Colorado has from time to time passed divers and numerous laws purporting and pretending to authorize the diversion of water from said Arkansas river and its tributaries, in said state, for uses and purposes other than domestic; more particularly

for the purpose of irrigating arid, non-riparian, non-saturated and waste lands for agricultural purposes in said state. In and by its said laws and through its officers and courts the said state has attempted to grant to its codefendants and to divers other persons, firms and corporations the right and authority to divert the waters of the Arkansas river and its tributaries, in Colorado, from their natural channels, and to cause said waters to flow into and through canals and ditches constructed for the purpose, extending great distances away from the natural channels of said streams, and to store said waters and to empty the same upon high arid lands, not riparian to said streams and not saturated thereby, as a result of the exercise of such pretended right, all of said waters are forever lost to such streams and are thus and thereby prevented from flowing into or through the state of Kansas.

Under and in pursuance of said constitutional provisions and the statutes of the state of Colorado, upwards of one thousand persons, firms and corporations, including those joined as defendants herein, claim to have acquired rights to divert water from said river and its tributaries, in the state of Colorado, for the purpose of irrigating such arid non-riparian and non-saturated lands in said state; and each of said persons, firms and corporations owns one or more ditches or canals

to carry said waters from the natural courses of said streams. Many of said canals and ditches are of great capacity, and are many miles in length. Many of said persons, firms and corporations have constructed great reservoirs within which to store, and in which are stored for use, vast quantities of the water of said streams before using it for the purpose of irrigation, as herein set forth.

That the said owners are so numerous that your orator has been unable to ascertain and set forth all of the same or make them defendants herein, except such as are herein set out and made defendants hereto.

That in the aggregate the appropriations so as aforesaid attempted to be made and licensed, from the Arkansas river, amount to 4200 cubic feet per second, and from the affluents and tributaries thereof to 4300 cubic feet per second.

That the average flow of the Arkansas river in the state of Colorado does not at any point on said river exceed 700 cubic feet per second, and the average flow of the affluents and tributaries thereof does not in the aggregate exceed 700 cubic feet per second.

That as a result thereof the total average flow of said Arkansas river, together with the average flow of all the affluents and tributaries thereto, is taken out, used and absorbed as hereinbefore and hereinafter alleged. And no portion of the ordi-

nary flow of the said Arkansas river is permitted to pass into the state of Kansas.

Said ditch owners, together with the state of Colorado, as hereafter set forth, are now diverting and at all times continue to divert from their natural courses the waters flowing in the bed of the Arkansas river and its tributaries, in said state, and are now carrying said waters to great distances from their natural courses and discharging them for agricultural purposes upon arid, non-riparian and non-saturated lands, where such waters are wholly lost to such streams and to the state of Kansas and its inhabitants. That such diversion is carried to such an extent that no water flows in the bed of said river from the state of Colorado into the state of Kansas during the annual growing season, and the underflow of said river in Kansas is diminishing and continuing to diminish, and if the said diversion continues to increase, the bottom lands of said valley will be injured to an enormous extent, and a large portion thereof will be utterly ruined and will become deserted and be a part of an arid desert.

The state of Colorado, through its laws, legislatures, officers, and agents, pretends to authorize and license the owners of said canals and ditches to take, carry away and so use the waters of said streams; and the state of Colorado, in addition to granting the right to take and use the water,

also claims the right to regulate and control the distribution of such water by canal and ditch owners to the owners of lands so irrigated, and grants permission and license to landowners of said state to take and receive the waters flowing in said canals and ditches and use the same for irrigation purposes, and for the sale thereof as merchandise. In addition to the foregoing, other canals and ditches for the diversion of waters from said river and its tributaries are contemplated for the purpose of irrigating arid non-riparian lands; and the extension of branches and laterals to those canals and ditches now built are contemplated and intended by the people of the state of Colorado; as is also the obtaining of additional privileges not heretofore granted for the diversion of water from said river, and its tributaries, and the irrigation of lands not now irrigated.

The state of Colorado and the said defendant corporations claim and openly assert their right and power to do as they please with all the water of the Arkansas river within the borders of Colorado, regardless of any rights which the state of Kansas or its citizens may have therein.

The state of Colorado has, since the year 1890, at and near the city of Canon City, in said state, constructed a great canal for the purpose of diverting water of the Arkansas river from its channel at said point and using the water for ir-

rigation purposes upon arid non-riparian and non-saturated lands, so that the water will not return to or again flow in said river; which said canal is now owned, controlled and managed by the state of Colorado. The said state authorizes, directs and permits its agents and employees so to divert from said river into said canal water to the amount of seven hundred and fifty-six and $\frac{28}{100}$ cubic feet per second, thereby greatly diminishing the flow of water in the river, which said amount is approximately the natural flow of said river at the place of said diversion. Said water so diverted and taken is sold by the state of Colorado to persons owning lands in the vicinity of said canal, and the water is used by such owners for irrigating such arid non-riparian and non-saturated lands. The waters so diverted from said river by the state of Colorado would otherwise flow into the state of Kansas and through said valley, and be vastly beneficial.

The state of Colorado intends and is threatening to build, and will build or cause to be built, unless restrained therefrom, other canals similar in size, character, and design, with the purpose and intention of forever diverting other large quantities of water from said river and irrigating other arid non-riparian and non-saturated lands, and the legislature of the state of Colorado has authorized the construction of other such canals along the river in said state. The

state of Colorado intends to, and will, unless restrained by this court, extend said canals and build branches and laterals thereto, and will use the water diverted from said river to irrigate arid non-riparian and non-saturated lands not now or ever previously irrigated.

The said state of Colorado has, by and through legislation, made large appropriations of money for the construction and erection of reservoirs within its territory for the storage of water from streams tributary to the Arkansas river in said state, and has provided boards of control to have charge of the construction, maintenance and operation of such reservoirs, and has provided that the waters so stored in reservoirs may be sold and disposed of for the purpose of being used in the irrigation of lands which are arid and non-riparian to and not saturated by the streams from which such waters are taken. And your orator further states, upon information and belief, that the said state of Colorado has since the year 1891 erected and constructed and is now using not less than four of such reservoirs—one in each of the counties of Custer, El Paso, Chaffee, and Las Animas—each of which reservoirs takes, stores and holds vast quantities of water which would otherwise flow into the state of Kansas; and, by reason of the use of said waters as afore-

said, no portion thereof is permitted to return to its natural channel or flow in said river.

The said state of Colorado is now preparing to construct and intends to construct, and unless restrained therefrom will construct, within its territory and near the said river and its tributaries, and at various points along the valley thereof, vast reservoirs within which further to store and hold the natural and the flood waters of said stream; and it is the intention and expectation of said state so to store and withhold and divert from the channel of said river all of the water thereof. And your orator states, upon information and belief, that surveys for such reservoirs have been made, and plans and specifications are being prepared for the construction of such reservoirs, and the state is preparing to enter upon the construction thereof. If said reservoirs are so constructed and operated by the state of Colorado, the natural flow of the river into the state of Kansas will be taken and held, and the waters thereof will be sold and used for the irrigation of arid and non-riparian and non-saturated lands not now irrigated, and will be forever lost to said river and the state of Kansas.

When the territory of Kansas was organized, in the year 1854, it extended from its present eastern boundary to the summit of the Rocky mountains, and all of the present drainage area of the Arkansas river in Colorado was then included in

the territory of Kansas, and during all of the period from then to the organization of the state of Kansas the common law and the riparian rights herein claimed extended over the whole of the Arkansas valley and to the summits of the Rocky mountains, and had for many years prior thereto. By reason of the prior settlement, occupation and title of the inhabitants of the state of Kansas upon and to the lands situate in the valley of said river, including those upon the banks of said river, the state of Kansas and the owners of land in said valley did acquire, and now have the right to, the uninterrupted and unimpeded flow of all of the waters of said river into and across the state of Kansas. The rights so claimed by your orator accrued prior to any of the said diversions by or in the state of Colorado, and prior to the accruing of any of the pretended rights claimed by the state of Colorado, or by persons, firms or corporations now taking water from said river or its tributaries.

8. Your orator further says: The state of Colorado, the other defendants herein named, and other persons, firms and corporations engaged in taking water from said river and its tributaries as aforesaid, under and in pursuance of authority and license pretended to be granted therefor by the state of Colorado, have by so doing wrongfully, illegally and unlawfully diverted said water from the accustomed channel into and

across the state of Kansas, and have greatly damaged and have irreparably injured the state of Kansas and the inhabitants thereof. And by reason of said diversion of water the fertility of all of the lands in said valley, including those upon the banks of said river as well as others, has been greatly diminished. During the spring and early summer, when crops are growing upon said valley lands in Kansas, the diversion of water in Colorado, as aforesaid, withholds from said Kansas valley lands, and particularly those upon the banks of said river, and those belonging to the state of Kansas above described, the waters to which said lands are entitled, with the result that the crops, trees and vegetation growing thereon languish and decline and in many places wither and perish; and wells which should furnish water for domestic use and animals become dry. The said damages are the proximate and necessary result of the diversion of said waters as aforesaid; and the amount of such damage is enormous and beyond computation, and amounts to vast sums annually, and such damages have increased year by year for the past ten years, substantially in proportion as the diversion of said waters in the state of Colorado has increased.

The property of your orator situated upon the banks of the river near Dodge City, and used for the purpose of a soldiers' home, as aforesaid, has been greatly damaged and specially injured by

reason of the diversion from its channel of the water which would otherwise flow in the said river by and underneath the said tract of land. Its fertility has been greatly diminished, its water-supply lessened, and its salubrity and utility impaired, and, unless the natural and normal flow of water is restored, the value of said property will be entirely destroyed, and the same will be rendered unfit for use as a soldiers' home, or for any purpose whatever. And the same is true of the property of your orator situate near the city of Hutchinson, and used for the purpose of a state industrial reformatory.

That by reason of the diversion of said waters, as herein described, during the summer season and during the dry portion of the year, when there is neither rainfall in the state of Kansas nor melting snows in the state of Colorado, the bed of said river in the state of Kansas above the city of Wichita becomes practically and oftentimes wholly dry. The bed of said stream, through the territory above described, is without high banks, and, in its natural condition, was but a few inches or a few feet below the bottom lands adjacent thereto. These adjacent bottom lands are of a loose, sandy loam, and are unprotected on either side by hills or mountains, or by any natural forests, and the bed of said stream is almost wholly of sand. During said dry portion of the year said territory is subject to high and

constant winds, and said winds change and fill up the bed of the stream and the natural channel thereof with drifting sand, dirt, and debris, until it is practically level with the lands adjacent thereto, and said obstructions are rapidly becoming permanent by growing vegetation, willows, and trees. And at the times of sudden and excessive rainfall in the state of Kansas, or sudden and excessive melting of the snows in the state of Colorado, the flood waters thereof cannot and do not flow down the natural channel of said river, now filled and obstructed as aforesaid, but overflow said adjacent bottom lands, washing channels therethrough, depositing dirt and debris thereon, and doing great damage to stock pastured, crops grown and improvements situate thereon, and greatly injuring and decreasing the value of said lands.

9. WHEREFORE, Your orator prays the aid of this honorable court, and asks that a decree may be entered prohibiting, enjoining and restraining the state of Colorado from granting, issuing, renewing, or permitting to be granted or issued or renewed, any charter, license, permit or authority to any person, firm or corporation for the diversion of any of the waters of the Arkansas river or of any of its tributaries from their natural beds, courses and channels within the state of Colorado, except for domestic use; or to con-

struct, maintain and operate any canals, ditches, branches, laterals or reservoirs now in use in said state.

Your orator further prays that the said state of Colorado as a state, and each and all the other defendants herein, may be prohibited, enjoined, and restrained from constructing, owning, or operating, either directly or indirectly, any canal or ditch whereby the usual and ordinary flow of the waters of said river, or any of its tributaries, shall be diverted from their natural courses and channels; and from constructing, owning, operating or using any reservoir for the storage of the usual and ordinary flow waters of said river, or any of its tributaries, for purposes of irrigation, sale or merchandise.

Your orator further prays this honorable court to fix and define the respective rights of your orator and the defendants herein in and to the waters of the Arkansas river, its affluents and tributaries, and to enter such decree herein as may be necessary for the adequate protection of the rights so fixed and defined.

Your orator further prays, that it may have such other and further relief in the premises as the nature of the circumstances of this case may require and as to this honorable court shall seem meet.

FORASMUCH, THEREFORE, As your orator is without remedy in the premises except in a court of

equity, may it please your honors to grant unto your orator not only a writ of injunction conformable to the prayer of this amended bill, but also a writ of subpœna of the United States of America directed to each and every of said defendants except the state of Colorado, thereby commanding them on a day certain, therein to be named, and under a certain penalty, to be and appear before your honorable court, then and there to answer all and singular the allegations of the foregoing amended bill (answer under oath being hereby especially waived), and to abide and perform such order and decree in the premises as may be awarded against them.

And your orator, as in duty bound, will ever pray, etc.

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Attorney-general of the State of Kansas, and Solicitor for Complainant.

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Of Counsel.